STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 23, 2007
v	No. 270414 Ionia Circuit Court
JAMES HENRY BUIE, Defendant-Appellant.	LC No. 05-012884-FC

Before: Hoekstra, P.J., and Sawyer and Murray, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree criminal sexual conduct, MCL 750.520b(1)(f), and was sentenced as a third habitual offender, MCL 769.11, to 315 to 600 months' imprisonment. He appeals as of right. We affirm.

I

Defendant first argues that his due process rights were violated because the trial court left his legs shackled during trial, after having left his hands shackled during jury selection. Generally, "[t]his Court reviews a decision to restrain a defendant for an abuse of discretion under the totality of the circumstances." *People v Dixon*, 217 Mich App 400, 404-405; 552 NW2d 663 (1996). However, although after jury selection had finished, defense counsel requested that the trial court at least unshackle defendant's writing hand during trial testimony, he never specifically challenged on constitutional grounds defendant's appearance before the jury in leg irons. Consequently, to avoid forfeiture of this unpreserved claim of constitutional error, defendant must establish plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999).

> It is well settled in Michigan that a trial court has broad discretion in controlling the course of a trial. Included within this authority is the discretion to shackle a defendant during trial. The right of a defendant to appear at trial without any physical restraints is not absolute. Nonetheless, permitting a defendant to appear at a jury trial free from handcuffs or shackles is an important component of a fair trial, because having a defendant appear before a jury handcuffed or shackled negatively affects the defendant's constitutionally guaranteed presumption of innocence. The Sixth Amendment guarantee of the right to a fair trial means that one accused of a crime is entitled to have his guilt or

> innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial.
>
> [I]n Michigan the propriety of handcuffing or shackling a testifying witness is subject to the same analysis as that for defendants, i.e., the handcuffing or shackling of a witness [or defendant] during trial should be permitted only to prevent the escape of the witness [or the defendant], to prevent the witness [or the defendant] from injuring others in the courtroom, or to maintain an orderly trial. [*People v Banks*, 249 Mich App 247, 256-257; 642 NW2d 351 (2002) (citations and internal quotation omitted).]

The record discloses that shackling was warranted in this case in furtherance of maintaining an orderly proceeding. Neither defendant nor defense counsel disputed the prosecutor's observation that defendant had "been one of the most difficult inmates we've had in recent history." Although the prosecutor and the trial court did not provide specific examples of defendant's misconduct while incarcerated, the record otherwise establishes that defendant exhibited oppositional behaviors throughout the trial court proceedings. After initially attempting to avoid trial by claiming incapacity, then refusing to cooperate with doctors and interrupting the trial court on the record before trial, defendant refused to participate in any discussion with the probation officer who prepared his presentence investigation report (PSIR), or to review the PSIR with defense counsel. During sentencing, defendant also turned his back to the trial court. Even without considering the oppositional behavior of defendant that occurred after the trial court made its ruling regarding shackling, we cannot conclude that the trial court abused its broad discretion in shackling defendant's legs during trial because (1) the record plainly reflects that the court was aware of defendant's constitutional rights to a fair trial free from shackles and a presumption of innocence, and (2) some evidence of record, namely the prosecutor's summary of defendant's misconduct while incarcerated and his repeated failures to cooperate in the proceedings before trial, support the trial court's ruling. *People v Dunn*, 446 Mich 409, 425-427; 521 NW2d 255 (1994); *Dixon*, *supra* at 404-405. Additionally, the record does not specifically indicate to what extent, if any, members of the jury could see the shackles on defendant's legs, or the shackles on his hands during jury selection. *Dunn*, *supra* at 424-425. In summary, defendant has failed to establish that the brief hand shackling during jury selection, or defendant's wearing of leg shackles during trial amounted to plain error affecting his substantial rights.[1]

II

Defendant next argues that the prosecutor committed misconduct during his rebuttal closing argument by referring to facts beyond the record and by denigrating defendant.

[1] Because the record reflects that grounds for shackling existed, defendant's related contention that defense counsel was ineffective for failing to object to the leg shackles lacks merit. *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004) ("[c]ounsel is not ineffective for failing to make a futile objection").

Defendant failed to preserve either claim of misconduct because he lodged no timely, contemporaneous objection to the prosecutor's allegedly improper arguments. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). Accordingly, defendant must again establish plain error affecting his substantial rights. *Id*. at 329-330.

A

Regarding defendant's first claim of impropriety, one of the theories presented by defense counsel in his closing argument involved defendant's related contentions that the police and prosecution manufactured the DNA evidence against him, and that he lacked the resources to compete with the government's case and was being "railroaded." In rebuttal, the prosecutor decried defendant's claim that he was being railroaded as "misleading," pointing out that the defense had been provided all DNA testing materials created or relied upon by the government and in fact "had their own guy look at it . . . ."

We conclude that reversal is not warranted because (1) there was no plain error, given that the prosecutor properly responded to defendant's misleading suggestion that the police and the prosecution had manufactured the case against him and prevented him from challenging the evidence they presented, *People v Dobek*, 274 Mich App 58, 67; 732 NW2d 546 (2007), and (2) even assuming that the prosecutor's comments reflect some improper argument beyond the scope of the trial evidence, no error affected defendant's substantial rights because (a) contrary to his argument on appeal, the comment quoted above did not expressly describe that an independent expert had confirmed the prosecution's DNA analysis, (b) the prosecutor's comment occurred only in the isolated context discussed above, and (c) the trial court properly instructed the jury regarding defendant's presumption of innocence, the burden of proof, that the arguments and statements of the attorneys did not constitute evidence, and that the jury "should only accept things the lawyers say that are supported by the evidence or by your own common sense and general knowledge." The trial court's instructions dispelled any prejudice arising from the prosecutor's comment. *Callon*, *supra* at 331.

B

Next, the prosecutor's references to defendant as a "child rapist" and "evil" constituted proper argument premised on the evidence presented at trial and the reasonable inferences arising therefrom. The trial evidence reasonably supports that defendant premeditated his sexual assault of the 13-year-old victim. Defendant appeared at the victim's door, drove her to a secluded location, threatened her with physical injury while holding a screwdriver to her throat, forcefully and repeatedly penetrated her, and threatened to come after her if she told anyone about the assault. Furthermore, the prosecutor owes no obligation to limit his arguments to bland and uncontroversial phrasing. *People v Williams*, 265 Mich App 68, 71; 692 NW2d 722 (2005). Additionally, the trial court's instructions cautioning the jury against considering the attorneys' arguments as evidence dissipated any potential prejudice.

III

Defendant additionally maintains that the trial court exceeded its authority when it imposed as part of his sentence $1,000 in court costs because no statute authorized the imposition of these costs. Because defendant did not object to the imposition of court costs

during the sentencing hearing or in a motion for resentencing, we review the claim to determine whether any plain error affected his substantial rights. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004).

A trial court's "sentencing authority is confined to the limits permitted by the statute under which it acts." *People v Krieger*, 202 Mich App 245, 247; 507 NW2d 749 (1993). "A trial court may only require a convicted defendant to pay costs where such a requirement is expressly authorized by statute." *People v Jones*, 182 Mich App 125, 126; 451 NW2d 525 (1989).

The trial court did not specify pursuant to what statute it imposed costs on defendant, including the court costs that defendant challenges on appeal. Defendant correctly observes that while MCL 769.1j authorizes the imposition of state costs on a convicted defendant, neither MCL 769.1j, MCL 769.1f, MCL 769.11, nor MCL 750.520b contemplates the imposition of court costs on a habitual offender defendant convicted of first-degree criminal sexual conduct.

Defendant further challenges the imposition of court costs as potentially justified by MCL 769.1k, which became effective on January 1, 2006. Defendant maintains that a retroactive application of MCL 769.1k would violate constitutional Ex Post Facto Clauses. US Const, art I, § 10; Const 1963, art 1, § 10. We need not address defendant's constitutional claim, however, because his argument fails to take into account MCL 769.34(6), which provides:

> As part of the sentence, the court may also order the defendant to pay any combination of a fine, costs, or applicable assessments. The court shall order payment of restitution as provided by law.

The clear and unambiguous language of § 34(6), broadly authorizing a sentencing court to impose *any* combination of fines and costs, authorized the trial court's imposition of $1,000 in court costs in this case. *People v Davis*, 468 Mich 77, 79; 658 NW2d 800 (2003). Although the circuit court did not cite § 34(6) as the basis for its assessment of costs, no indication exists that the court intended to apply MCL 769.1k. Because § 34(6) plainly supports the trial court's imposition of costs, defendant has failed to establish that the assessment of court costs amounted to plain error affecting his substantial rights. *Kimble*, *supra* at 312.

IV

In a pro se supplemental brief, defendant makes several assertions that his trial counsel was ineffective. Defendant raised no suggestion before the trial court, either in a motion for a new trial or request for an evidentiary hearing, that his counsel was ineffective. Therefore, appellate review of this claim is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

To establish ineffective assistance of counsel, a defendant must demonstrate that his counsel's performance fell below an objective standard of reasonableness and that counsel's representation so prejudiced the defendant that he was deprived of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). With respect to the prejudice aspect of the test for ineffective assistance, the defendant must demonstrate the reasonable probability that but for counsel's errors the result of the proceedings would have been different, and that the attendant

proceedings were fundamentally unfair and unreliable. *Id*. at 312, 326-327; *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). The defendant must overcome the strong presumptions that his counsel provided effective assistance and that his counsel's actions represented sound trial strategy. *Id.* at 714-715.

A

Defendant first contends that his trial counsel was ineffective because he failed to arrange for independent testing of DNA evidence that the prosecution introduced at trial. The record does not support defendant's claim. After jury selection concluded, defense counsel placed on the record a summary of the independent DNA review that took place and defendant's request for additional testing. Because this summary reflects that defense counsel arranged for an independent forensic expert's review of the state police crime laboratory's DNA methodology and report, and that counsel also raised defendant's request for the independent examiner to reassemble DNA profiles from the trial evidence, counsel did not act in an objectively unreasonable manner. Further, defendant has not shown any unfair impact on his right to a fair trial because he offers no basis for contradicting the independent examiner's approval of the state police crime laboratory's DNA procedures and conclusions.

B

Defendant also protests that trial counsel was ineffective for failing to raise more than three objections during trial and by inadequately cross-examining the victim. Defendant fails to substantiate his claim concerning inadequate objections because he offers no specific examples of instances when counsel unreasonably failed to object, and identifies no specific prejudice arising from counsel's alleged failure to make more than three objections. Regarding cross-examination of the victim, defendant fails to establish ineffective assistance because (1) counsel's decision concerning what questions to pose to a witness constitutes a matter of trial strategy that this Court generally will not second guess, *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999), (2) counsel otherwise diligently cross-examined the victim at some length, including with respect to (a) her consistency in describing the time frame surrounding the assault and the assault's details, and (b) a potential motive to fabricate the allegations against defendant, and (3) defendant entirely fails to explain how the alleged insufficiency of his counsel's cross-examination prejudiced him.

Our review of the record reveals that at all stages of the proceeding, defense counsel diligently acted to protect defendant's right to a fair trial. For example, counsel made several pretrial motions to determine defendant's competency and criminal responsibility, cross-examined all prosecution witnesses, presented alibi testimony on defendant's behalf, and argued at length in closing that numerous inconsistencies in the prosecution's case amounted to reasonable doubt.

C

To the extent that defendant also contends that trial counsel had a conflict of interest, the trial court held a hearing to address a motion to withdraw filed by defense counsel, which disclosed as a potential conflict of interest counsel's recent placement on the Ionia City Council and the fact that the Ionia Department of Public Safety had investigated the case against

defendant. Defense counsel denied that he owed the council any responsibility as a client that would materially affect his obligations to defendant, and denied that he possessed some personal interest in the result of defendant's trial. Moreover, the record reflects that defendant affirmatively expressed his approval of defense counsel's continued representation of him despite the reported conflict. Because defendant affirmatively expressed his approval of defense counsel despite the alleged conflict, he extinguished any error premised on a potential conflict of interest. *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000).

V

Defendant next raises for the first time on appeal the related contentions that (1) the prosecution or the police lost or tampered with DNA evidence, (2) the prosecution suppressed evidence favorable to him, and (3) the trial court failed to afford the defense full and fair discovery. Because defendant failed to preserve any of these issues, we review them for plain error affecting his substantial rights. *Carines*, *supra* at 763-764; *People v Hanks*, ___ Mich App ___; ___ NW2d ___ (Docket No. 266086, issued June 19, 2007), slip op at 1-3.

A

Defendant misrepresents the record to the extent that he characterizes as contradictory the testimony of Detective John Odette regarding the timing of his transportation of various items of evidence to the state police crime laboratory for DNA testing. Odette testified that on November 18, 2004, he transported from storage at the Ionia Department of Public Safety to the Michigan State Police crime laboratory in Lansing "several pieces of evidence," including a tape-sealed "CSC kit, some pants, some cuttings, trace evidence, items like that." With regard to oral swabs from defendant, however, Odette explained that he helped obtain these on a later date during defendant's incarceration at the Ionia County Jail, and that immediately thereafter he drove them to the Lansing crime laboratory. Thus, the record does not support's defendant's suggestion that Odette claimed to have transported everything to the crime laboratory on November 18, 2004.

B

Defendant appears to suggest also that the police mishandled or "tampered with" the CSC kit and the victim's pants, shirt, and sweater by storing these "for a long time unrefrigerated" in department evidence lockers. Officer Michael Cronk testified that after the CSC kit was assembled late on November 13, 2004, he placed it and the victim's clothing in storage lockers at the Ionia Department of Public Safety; Cronk did not specifically describe the lockers as refrigerated or not. Forensic expert Kathy Fox subsequently testified that optimal conditions for storing and preserving DNA included keeping it "cool and dry." But even accepting the proposition that the police failed to place the crime scene evidence in less than optimal storage conditions between November 13, 2004 and November 18, 2004, no evidence of record gives rise to a reasonable inference that these several days of storage somehow degraded or "tampered with" the DNA present on the evidence, thus resulting in faulty DNA test results.

C

Defendant next offers the supposition that if saliva, not semen, is "really on [the victim's] vaginal swab and underwear," then defendant's "swab was tampered with because it will not be

semen." But defendant offers nothing beyond speculation that for some reason, saliva may have been present on the victim's vaginal swab and her underwear. Furthermore, independent testing for the defense found no basis for questioning Fox's determination that semen existed on the victim's vaginal swabs and underwear, or conclusion that whatever the source of the male DNA present in the victim's vagina and on her underwear, the DNA profile matched defendant's.

D

Defendant additionally suggests that the prosecution or the police lost, or at least failed to test, seat cuttings taken from the van in which the assault occurred. Officer Cronk testified that the police recovered from defendant's wife's van a clear bottle, a screwdriver, seat cuttings, "a possible crack pipe" and "what appeared to be a billy club." Detective Odette then explained that he took to the state police crime laboratory "several pieces of evidence. One was what is called a criminal sexual conduct kit or a CSC kit, some pants, some cuttings, trace evidence, items like that. I think there were six or seven." When Fox later testified regarding her DNA testing, she recalled receiving and performing testing on "a sample identified as a known sample from [the victim], a known sample from [defendant], a vaginal swab and a sample identified as cuttings from underwear," and expressly denied ever receiving any cuttings from a vehicle's interior. Although Odette did not expressly profess to have delivered cuttings from the van to the crime laboratory, viewing the testimony in the light most favorable to defendant, some discrepancy can be read to exist between Odette's description of the items he delivered and the items Fox received.

Notwithstanding this potential discrepancy, however, neither the prosecution nor the police had an obligation to pursue DNA analysis of the van cuttings. *People v Anstey*, 476 Mich 436, 460-461; 719 NW2d 579 (2006), cert den ___ US ___; 127 S Ct 976; 166 L Ed 2d 740 (2007). Furthermore, defendant has offered nothing that would support a reasonable inference that the police or prosecution acted in bad faith, or that the van cuttings might have contained exculpatory evidence. In light of the fact that DNA testing on the vaginal swabs, the victim's underwear, and oral swabs from defendant demonstrated that defendant's profile matched the DNA profile present on the victim's underwear, at least to a very high degree of statistical probability, nothing potentially favorable to defendant could have been derived from DNA testing of the van cuttings. Whatever DNA profiles forensic experts may have gleaned from the van cuttings would not have altered the positive identification of defendant's DNA on the victim's underwear.

E

With respect to defendant's insinuation that a discovery violation occurred involving a report documenting nurse Maureen Gebben's examination of the victim on November 13, 2004, Gebben testified that she initially recorded the assault date as October 12, 2004, which date appeared on defense counsel's copy of Gebben's report. Gebben explained that when she later realized that she had written an incorrect assault date on the report of the CSC examination, she crossed out October 12, 2004, inserted the correct date of November 12, 2004, and placed her initials next to the corrected date. Gebben denied altering any other aspect of the report, and defense counsel's questioning of Gebben concerning her report reflects that her report otherwise had remained the same. The record does not support defendant's insinuation that a second,

different report documenting Gebben's examination of the victim existed, or that the prosecution withheld from the defense any information derived from the CSC kit.

F

To the extent that defendant recasts his complaint regarding allegedly insufficient independent DNA testing as an assertion that the trial court "put the dagger in the heart of discovery" by refusing him an independent forensic examination, as previously discussed, the trial court did supply defendant with an independent forensic expert, who thoroughly reviewed the state police crime laboratory's procedures and testing results. Again, defendant offers only speculation to undercut the independent expert's findings that the state police crime laboratory soundly performed its DNA analysis.

In summary, defendant has failed to substantiate that the prosecution suppressed any evidence favorable to him or that the trial court interfered with full discovery. Consequently, he has failed to establish plain error requiring relief.

VI

Defendant next asserts that the trial court erred by sentencing him on the basis of inaccurate information in the presentence information report (PSIR) concerning a juvenile offense and the number of his prior felony convictions. We review for an abuse of discretion a sentencing court's response to a claim of inaccuracies in a defendant's PSIR. *People v Spanke*, 254 Mich App 642, 648; 658 NW2d 504 (2003).

Defense counsel advised the trial court at sentencing that defendant (1) protested the PSIR's inclusion of a 1979 juvenile adjudication of attempted breaking and entering in Kansas, (2) challenged the PSIR's reference to two misdemeanor convictions, and (3) claimed that the PSIR should not have mentioned a 1986 conviction of assault with intent to rob while armed, as a potential basis for habitual offender sentence enhancement. However, because (1) the record reflects that the information concerning all of defendant's prior convictions was contained in previous presentence reports that defendant either did not object to or was left in by the trial court, (2) defendant refused to cooperate with the investigator in preparing the PSIR in this case, (3) at the sentencing hearing, defendant offered no evidence in support of his objections that the juvenile and misdemeanor convictions had not occurred, and (4) with respect to defendant's 1986 felony conviction of assault with intent to rob while armed, although no date of discharge from prison appears in the PSIR, his minimum ten-year term of imprisonment would have expired less than ten years before his November 2004 commission of the charged crime in this case, thus satisfying the "10-year gap rule" in MCL 777.50,[2] we conclude that the trial court did not abuse its discretion by approving the prior offense information contained in the PSIR or by sentencing defendant on the basis of the information.[3]

[2] Michigan Sentencing Guidelines Manual (2007 ed), 3.

[3] Because defense counsel did timely raise defendant's objections to the information contained in the PSIR, he was not ineffective in this regard.

VII

Lastly, defendant insists that the trial court erred by failing to order an independent examination of his competency before trial. Our review of the pretrial competency hearings, however, reflects that the trial court carefully adhered to the requirements of MCR 6.125 governing the investigation of defendant's competency to stand trial. By the time of the second competency hearing in September 2005, a doctor at the center for forensic psychiatry had deemed defendant competent to stand trial. Because defendant requested an independent competency examination solely on the basis of his unsupported claim of bias by the center for forensic psychiatry, the trial court properly acted within its discretion in rejecting his request. MCR 6.125(D); see also *People v Farmer*, 53 Mich App 133, 135; 218 NW2d 836 (1974).

Affirmed.

/s/ Joel P. Hoekstra
/s/ David H. Sawyer
/s/ Christopher M. Murray